

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 05-CV-00329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION TO COMPEL
SIMMONS FOODS, INC. TO RESPOND TO ITS MAY 30, 2006
SET OF REQUESTS FOR PRODUCTION AND BRIEF IN SUPPORT**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and for its Motion to Compel Simmons Foods, Inc. to Respond to its May 30, 2006 Set of Requests for Production states as follows:¹

I. INTRODUCTION

On May 30, 2006 the State propounded to Defendant Simmons Foods, Inc. ("Simmons") requests for production centering on documents and materials produced to plaintiffs in a similar poultry waste pollution lawsuit previously brought in this Court, *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900. The requested documents and materials concern documents and materials made available for inspection and copying by Simmons to plaintiffs in the *City of Tulsa* lawsuit (Request for Production No. 1); privilege logs produced by Simmons to plaintiffs in the *City of*

¹ The parties conferred in good faith on July 31, 2006, and have been unable to reach an accord on the matters that are the subject of this motion.

Tulsa lawsuit (Request for Production No. 2); written discovery responses made by Simmons to plaintiffs in the *City of Tulsa* lawsuit (Request for Production No. 3); transcripts of persons in Simmons' employ and / or under contract with Simmons who were deposed in the *City of Tulsa* lawsuit, including all exhibits referenced in the deposition (Request for Production No. 4); transcripts of depositions of persons retained by Simmons as expert witnesses who were deposed in the *City of Tulsa* lawsuit (Request for Production No. 5); documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa* lawsuit (Request for Production No. 6); and joint defense agreements to which Simmons is a party that pertain to, in whole or in part, the current lawsuit, *State of Oklahoma v. Tyson Foods, Inc.* (Request for Production No. 7). (Simmons Foods, Inc. Responses to Plaintiffs' May 30, 2006 Set of Request for Production of Documents [Ex. A].) The State's requests for production, given the similarities between its case and the *City of Tulsa* lawsuit, *see infra*, were simply an effort to save all the parties involved time and money. *See* Fed. R. Civ. P. 1.

In response to Requests for Production Nos. 1-7, however, Simmons objected and responded with this objection:

Simmons objects to this Request on the grounds that it is overly broad and unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents concerning third party operations outside the Illinois River Watershed, seeks documents concerning Simmons' operations outside the Illinois River Watershed, and seeks documents prior to 2002, which is beyond the earliest time period allowed by statutes of limitations applicable to Plaintiff's claims. Simmons further objects to this Request on the grounds that it seeks confidential and proprietary trade secret or business documents subject to a Protective Order dated March 29, 2002. Simmons further objects to this Request because it seeks documents exchanged in conjunction with the Court-Order Settlement Conferences and is protected by Fed. R. Evid. 408 and the Court's Settlement Order dated May 21, 2002, and subsequent Settlement Conference Orders.

(Simmons Foods, Inc. Responses to Plaintiffs' May 30, 2006 Set of Request for Production of Documents [Ex. A].)² In sum, Simmons' overarching position appears to be that documents and materials involved in a similar prior case in which it was involved have absolutely no bearing on matters in this case. This claim is untenable.

The similarities between this lawsuit and the *City of Tulsa* case are numerous, particularly with regard to the Poultry Integrator Defendants' conduct and the theories of Poultry Integrator Defendants' legal liability. For instance:

- Both cases involve government entities suing poultry integrators for pollution to Oklahoma waters. (*Compare* Oklahoma Compl. ¶ 5 with Tulsa Compl. ¶ 3.)
- The Oklahoma suit names six of the seven defendants named in the *City of Tulsa* suit (Tyson Foods, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., Simmons Foods, Inc., Cargill, Inc., and George's, Inc.), and those six defendants are poultry integrators. (*Compare* Oklahoma Compl. ¶¶ 6-21 with Tulsa Compl. ¶¶ 4-9.)
- Both cases allege impairment of the beneficial and public use and enjoyment of Oklahoma waters. (*Compare* Oklahoma Compl. ¶¶ 25-27 with Tulsa Compl. ¶¶ 2, 29.)
- Both cases allege pollution of water bodies that are sources of drinking water. (*Compare* Oklahoma Compl. ¶ 28 with Tulsa Compl. ¶¶ 11-14.)
- Both cases are actions for pollution by poultry integrators of a watershed area. (*Compare* Oklahoma Compl. ¶¶ 22-23 with Tulsa Compl. ¶¶ 14-16.)
- Each case has as its gravamen the pollution activities by the poultry integrators in a watershed area. (*Compare* Oklahoma Compl. ¶¶ 51-55 with Tulsa Compl. ¶ 16.)
- Both cases allege that the same type of activities by the poultry integrators are the cause of the pollution of the waters. (*Compare* Oklahoma Compl. ¶¶ 32-42 with Tulsa Compl. ¶ 18.)
- Both cases allege that the relationship between the poultry integrators and their growers is a relationship of employer / employee or principal / agent, and that the relationship of the growers to the poultry integrators is not that of an independent contractor. (*Compare* Oklahoma Compl. ¶ 43 with Tulsa Compl. ¶ 18.)

² Such "confidentiality" and "trade secret" objections will be dealt with pursuant to the confidentiality order contemplated by this Court's August 15, 2006 Order (DKT #888).

- Both cases focus on the specific manner in which the poultry integrators and their growers dispose of poultry waste on land as the underlying cause of the pollution and damages complained of. (*Compare* Oklahoma Compl. ¶¶ 48-57 with Tulsa Compl. ¶ 19.)
- Both cases allege that overload levels of phosphorus and nitrogen from the poultry waste create part of the pollution and damages complained of. (*Compare* Oklahoma Compl. ¶¶ 58-61 with Tulsa Compl. ¶ 20.)
- Both cases assert a CERCLA cause of action. (*Compare* Oklahoma Compl. ¶¶ 70-77 with Tulsa Compl. ¶¶ 33-41.)
- Both cases assert a state law nuisance claim. (*Compare* Oklahoma Compl. ¶¶ 90-100 with Tulsa Compl. ¶¶ 47-52.)
- Both cases assert a state law claim for trespass. (*Compare* Oklahoma Compl. ¶¶ 111-119 with Tulsa Compl. ¶¶ 53-56.)
- Both cases assert a state law claim for unjust enrichment. (*Compare* Oklahoma Compl. ¶¶ 132-139 with Tulsa Compl. ¶¶ 68-71.)

It is clear that this case and the *City of Tulsa* case involve many similar questions of facts, many similar questions of law, and a substantial identity of the defendant parties.³ Thus, Simmons' boilerplate objection that the State's Requests for Production are "overly broad and unduly burdensome" and "not reasonably calculated to lead to the discovery of admissible evidence" has no merit, especially given the fact that Simmons' Objections and Responses give no rational basis for this position.⁴

³ Admittedly, the instant case and the *City of Tulsa* case are not completely identical. For example, the instant case involves broader injury and damages claims than those alleged in the *City of Tulsa* case. But this in no way diminishes the relevancy of the State's discovery requests

⁴ Indeed, Simmons cannot credibly assert that its poultry waste handling practices (or the adverse environmental impact of those practices) in the Eucha-Spavinaw Watershed are *sui generis*.

II. ARGUMENT

A. The State's Requests for Production Ask for Relevant, Discoverable Documents and Materials from Related Prior Litigation

As described above, the State is requesting documents and materials from prior litigation that involved many similar issues. Such requests are relevant to the instant lawsuit, and are discoverable.

A Kansas District Court dealt with this issue in *Snowden v. Connaught Labs., Inc.*, 137 F.R.D. 325 (D. Kan. 1991). The *Snowden* plaintiffs brought a products liability action over the DPT vaccine and requested the production of “documents, records and pleadings growing out of prior litigation.” *Snowden*, 137 F.R.D. at 327. The requests for production were virtually identical in nature to what the State has asked for here, and included the following sorts of requests for documents and materials from the prior litigation:

- Copies of interrogatories directed to defendants and their responses;
- Copies of requests for production of documents and their responses;
- Copies of requests for admissions and their responses;
- Copies of depositions taken of defendants’ employees and former employees; and
- Copies of transcripts of court testimony.

Snowden, 137 F.R.D. at 328. The *Snowden* plaintiffs argued that the documents were relevant and material because “the other lawsuits are identical in nature” and production “would serve to limit the breadth and scope of discovery.” *Snowden*, 137 F.R.D. at 328.

Defendants in *Snowden* – just like Simmons here – argued that the materials did not have to be produced because the request was “unduly burdensome and excessive due to the scope” and “not reasonably calculated to lead to admissible evidence.” *Snowden*, 137 F.R.D. at 328. Defendants in *Snowden* also argued that there was no central repository for the documents and

that they were “in the possession of various lawyers who are no longer employed” by defendants. *Snowden*, 137 F.R.D. at 328.⁵

In rejecting defendants’ arguments and granting plaintiffs’ motion to compel, the *Snowden* court observed that “[i]t is plain that the scope of discovery through interrogatories and requests for production of documents is limited only by relevance and burdensomeness.” *Snowden*, 137 F.R.D. at 329 (quoting *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975)). The test for relevancy is a liberal one: “a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the actions.” *Snowden*, 137 F.R.D. at 329. Put another way, discovery should be allowed unless it is clear that the information cannot have any possible bearing on the subject matter of the action.

The *Snowden* court determined that the claims asserted “would presumably be the same types of claims” asserted in the prior cases and that the subject matter would be the same. *Snowden*, 137 F.R.D. at 330. Such is the case here. The *Snowden* court also recognized that the information sought from the prior litigation “could save the time and expense of duplicating discovery aimed at the same issues and materials already produced in prior litigation.” *Snowden*, 137 F.R.D. at 330. The similarity of the cases lead the *Snowden* court to conclude that “it is not unlikely that discovery of this nature will lead to admissible evidence,” “plaintiffs’ claim of relevance has merit,” and “the documents, pleadings and records plaintiffs seek meet the broad test of relevancy under Rule 26 and the case law construing that rule.” *Snowden*, 137 F.R.D. at 330.

⁵ Simmons’ counsel here represented Simmons in the *City of Tulsa* case. See *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1269 (N.D. Okla. 2003), *vacated in connection with settlement*.

A Maryland District Court reached the same conclusion when addressing plaintiffs' motion to compel documents related to two lawsuits brought against the defendant in other jurisdictions. *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495 (D. Md. 2000). There, defendant objected to production of the documents on grounds of relevance and burdensomeness, among other grounds. *Tucker*, 191 F.R.D. at 497. The *Tucker* court rejected defendant's relevance and burdensomeness arguments.

First, the *Tucker* court ruled that plaintiffs had established threshold relevance under Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 401 because plaintiffs in the prior case alleged the same causes of action as were alleged in the case before the court. *Tucker*, 191 F.R.D. at 497-98. Second, the *Tucker* court characterized defendant's assertions of burdensomeness as "non-specific objections, which are insufficient to prevent the requested discovery." *Tucker*, 191 F.R.D. at 498. As the *Tucker* court noted, "[t]he party claiming that a discovery request is unduly burdensome must allege specific facts that indicate the nature and extent of the burden, usually by affidavits or other reliable evidence. A conclusory assertion of burden and expense is not enough." *Tucker*, 191 F.R.D. at 498 (citations omitted).

The *Snowden* and *Tucker* courts' reasoning is directly applicable to the issue before this Court, and supports a grant of the State's Motion to Compel.

B. The State's Discovery Is Not Restricted by a Statute of Limitations

Simmons' contention that the State's Requests for Production are somehow restricted by a statute of limitations ignores the fact that the statute of limitations under Oklahoma law does not run against the State when it is acting, as is the case here, in its sovereign capacity to enforce a public right. *See State v. Tidmore*, 674 P.2d 14, 15 (Okla. 1983) ("We have long-recognized the general rule that statutes of limitations do not operate against the state when it is acting in its

sovereign capacity to enforce a public right") (citations omitted); *Oklahoma City Municipal Improvement Authority v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988) ("From these cases we distill the general rule that statutes of limitation shall not bar suit by any government entity acting in its sovereign capacity to vindicate public rights, and that public policy requires that every reasonable presumption favor government immunity from such limitation"). Accordingly, this objection should be overruled.⁶

C. Simmons' Formulaic, Boilerplate Objections Are Inadequate

Simmons' standard, boilerplate objection to the State's Requests for Production indicates the lack of seriousness that attends Simmons' consideration of the Requests. A party resisting production has the burden of establishing lack of relevancy or undue burden. *Oleson v. Kmart Corp.*, 175 F.R.D. 560, 565 (D. Kan. 1997) (citing *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984)). The party resisting discovery must show the court "that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed. R. Civ. P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Burke v. New York City Police Department*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987).

"The litany of overly burdensome, oppressive, and irrelevant does not alone constitute a successful objection to a discovery request." *Oleson*, 175 F.R.D. at 565; *see also Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3rd Cir. 1982) (the "mere statement by a party that the [discovery request] was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to

⁶ In any event, even assuming arguendo that there were an applicable statute of limitations, it is well-established that "[i]n proper circumstances (particularly where such discovery is useful in understanding more recent events) discovery may be allowed about events that occurred at a time when a claim based upon them would be barred by limitations." Wright & Miller, *Federal Practice & Procedure*, § 2009.

voice a successful objection”) (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986) (holding objecting party must demonstrate that a particularized harm is likely to occur if the discovery be had by the party seeking it). Boilerplate burdensomeness and relevancy objections that do not set out any explanation or argument for burdensomeness or irrelevancy are improper. *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006).

As one court noted, in language directly applicable here, “each objection asserted by the [resisting party] is boilerplate, obstructionist, frivolous, overbroad, and, significantly, contrary to well-established and long standing federal law.” *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 511 (N.D. Iowa 2000). The Court should reject Simmons’ boilerplate objections and compel it to produce the documents requested.

D. Simmons' Fed. R. Evid. 408 Objections Are Inspecific

The State has sought documents and materials dealing with the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa* case. Simmons has raised a Fed. R. Evid. 408 objection. “. . . Rule 408 is a rule regarding admissibility and not discoverability. Federal Rule of Civil Procedure 26(b)(1) provides that '[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.'" *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 685 (D. Kan. 2004). In any event, based upon the information provided, it is impossible for the State to evaluate Simmons' Fed. R. Evid. 408 objection. Simmons should provide a log of all such documents covered by this objection so that the propriety of this objection can be properly evaluated by the State.

E. Joint Defense Agreements are Discoverable

The State's Request for Production No. 7 requests "copies of all joint defense agreements to which you are a party that pertain to, in whole or in part, the *State of Oklahoma v. Tyson Foods, Inc.*, 05-CV-329, lawsuit." Simmons does not raise any attorney-client privilege or work product protection claims to this request (or, for that matter any other of the requests).

The State is requesting copies of any joint defense agreements themselves. Such agreements are relevant inasmuch, to the extent there are any, they are necessary for the State to evaluate Simmons' privilege claims in this litigation. Therefore, the Court should order Simmons to produce copies of any such agreements.

III. CONCLUSION

For all of the above reasons, the State of Oklahoma respectfully requests the Court to compel Defendant Simmons Foods, Inc. to respond to the State's May 30, 2006 set of requests for production and produce the requested documents forthwith.

Respectfully Submitted,

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I hereby certify that on this 24 day of August, 2006, I electronically transmitted the attached document to the following:

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M. David Riggs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.)

Plaintiffs)

v.)

Case No. 4:05-cv-00329-TCK-SAJ

TYSON FOODS, INC., et al.)

Defendants)

SIMMONS FOODS, INC.'S
RESPONSES TO PLAINTIFFS' MAY 30, 2006 SET OF
REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now the Separate Defendant, Simmons Foods, Inc. ("Simmons"), and for its Responses to Plaintiffs' May 30, 2006 Set of Request for Production of Documents, states and alleges as follows:

GENERAL OBJECTIONS

1. Simmons objects to Plaintiffs "Instructions and Definitions" to the extent they seek to include "agents" and "Contract Growers" in the definition of Simmons and the definition of "you" and "yours". Simmons further objects to and does not agree that it has any obligation or the ability to produce documents from any person or entity other than Simmons.

REQUEST FOR PRODUCTION NO. 1: Please produce for inspection and copying copies of all documents and materials made available for inspection and copying by you to the plaintiffs in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit.

RESPONSE: Simmons objects to this Request on the grounds that it is overly broad and unduly burdensome and is not reasonably calculated to lead to the discovery of



admissible evidence because it seeks documents concerning third party operations outside the Illinois River Watershed, seeks documents concerning Simmons' operations outside the Illinois River Watershed, and seeks documents prior to 2002, which is beyond the earliest time period allowed by statutes of limitations applicable to Plaintiff's claims. Simmons further objects to this Request on the grounds that it seeks confidential and proprietary trade secret or business documents subject to a Protective Order dated March 29, 2002. Simmons further objects to this Request because it seeks documents exchanged in conjunction with the Court-Ordered Settlement Conferences and is protected by Fed. R. Evid. 408 and the Court's Settlement Order dated May 21, 2002, and subsequent Settlement Conference Orders.

REQUEST FOR PRODUCTION NO. 2: Please produce for inspection and copying copies of all privilege logs produced by you to the plaintiffs in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 3: Please produce for inspection and copying copies of all written discovery responses made by you to the plaintiffs in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 4: Please produce for inspection and copying copies of all transcripts of depositions of persons in your employ and/or under contract with you who were deposed in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit including all exhibits referenced in the deposition.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 5: Please produce for inspection and copying copies of all transcripts of persons retained by you as expert witnesses who were deposed in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 6: Please produce for inspection and copying copies of all documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 7: Please produce for inspection and copying copies of all joint defense agreements to which you are a party that pertain to, in whole or in part, the *State of Oklahoma v. Tyson Foods, Inc.*, 05-CV-329 lawsuit.

RESPONSE: See Response to Request for Production No. 1.

SIMMONS FOODS, INC.,

Defendant

By: 

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